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No. 90-505

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In the Supreme Court of the United States

OCTOBER TERM, 1990

CALIFORNIA PUBLIC UTILITIES COMMISSION,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION AND
BONNEVILLE POWER ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (FERC) is authorized by Section 7(k) of the Pacific Northwest Electric Power Planning and Conservation Act to hold an evidentiary hearing for the purposes of supplementing the record in connection with its review of nonfirm rates established by the Bonneville Power Administration (BPA).

2. Whether FERC's orders approving nonfirm rates set by BPA were supported by substantial evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A34) is reported at 903 F.2d 585. The orders of the Federal Energy Regulatory Commission (Pet. App. C1-C41, D1-D9) are reported at 36 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,335 and 39 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,033.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1989. Petitions for rehearing were denied on June 21, 1990. Pet. App. B1-B2. The petition for a writ of certiorari was filed on September

19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Bonneville Power Administration (BPA) is a self-financing agency within the United States Department of Energy. BPA markets power from thirty federal hydroelectric projects and two nuclear power plants known collectively as the Federal Columbia River Power System. BPA also purchases power and carries out energy conservation programs. The Columbia River System includes a network of dams and reservoirs capable of storing approximately 40% of the average annual streamflow of the Columbia River. Despite this large storage capacity, BPA lacks sufficient water to operate its hydroelectric generating facilities at full capacity throughout the year. BPA plans to meet its "firm power" loads on the assumption that streamflows will equal the lowest flows on record. *United States Dep't of Energy—Bonneville Power Admin.*, 29 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 63,039, at 65,123 (1984).[1] As a result of this conservative assumption, the Columbia River System produces very large amounts of nonfirm energy in four out of every five years. *Ibid.* BPA operates the system so as to maximize the production of useful energy. Pet. App. C6-C7.

BPA's reservoirs integrate its hydroelectric and thermal generating capacity. By operating its thermal generators (or by purchasing power from other sources), BPA is able to accumulate water in its

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[1] "Firm power" is energy that BPA expects to produce under predictable streamflow conditions. "Nonfirm power" is energy in excess of firm power. *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, 467 U.S. 380, 383 (1984).

reservoirs that can be used to generate electricity at a later time. Consequently, energy produced by water released from a reservoir of the Columbia River System may result from the expenditure of thermal resources, streamflows, or a combination of the two. Because the system relies heavily on hydroelectric generation, and because it stores large amounts of potential energy by expending thermal and purchased resources (as well as through conservation programs), it is not feasible for BPA to attribute an increment of nonfirm energy to the resource that produced it. Consequently, it is not feasible for BPA to ascertain the incremental cost of a unit of energy. BPA can, however, determine the total cost of producing a quantity of energy over time and derive an average cost per unit from this figure. Pet. App. C7-C8.

2. In 1964 Congress enacted the Pacific Northwest Consumer Power Preference Act, 16 U.S.C. 837 *et seq.*, which prohibits the sale of electric energy from federal hydroelectric facilities in the Columbia River System to customers outside the Pacific Northwest region unless there is no market for the power in the Pacific Northwest at the established rate. In 1980, Congress enacted the Pacific Northwest Electric Power Planning and Conservation Act (the Regional Act), which among other things authorizes the Administrator of BPA to sell surplus firm and nonfirm power pursuant to the preference provisions of the 1964 Act, 16 U.S.C. 839c(f), 839f(c), and requires BPA to establish rates sufficient to cover BPA's costs.[2] Section 7(k) of the Regional Act au-

[2] Section 7(a) of the Regional Act provides in pertinent part that BPA's rates

> shall be established and, as appropriate, revised to recover, in accordance with sound business principles, the

thorizes FERC to review BPA's nonfirm rates applicable to customers outside the Pacific Northwest region to determine whether the rates comply with the standards of the Federal Columbia River Transmission System Act, 16 U.S.C. 838g-h, the Flood Control Act of 1944, 16 U.S.C. 825s, and the Bonneville Project Act of 1937, 16 U.S.C. 832e-f.[3]

3. This case involves two nonfirm rates, known as NF-1 and NF-2, established by the Administrator of BPA under Section 7(k) of the Regional Act for

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> costs associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the Federal Columbia River Power System * * * over a reasonable period of years and the other costs and expenses incurred by the Administrator pursuant to this chapter and other provisions of law.

16 U.S.C. 839e(a)(1).

[3] Section 7(k) of the Regional Act provides in pertinent part:

> Notwithstanding any other provision of this chapter, all rates or rate schedules for the sale of nonfirm electric power within the United States, but outside the region, shall be established * * * in accordance with the procedures of subsection (i) of this section. * * * [S]uch rates or rate schedules shall become effective after review by the Federal Energy Regulatory Commission for conformance with the requirements of such Acts and after approval thereof by the Commission. Such review shall be based on the record of proceedings established under subsection (i) of this section. The parties to such proceedings under subsection (i) of this section shall be afforded an opportunity by the Commission for an additional hearing in accordance with the procedures established for ratemaking by the Commission pursuant to the Federal Power Act.

16 U.S.C. 839e(k).

sales of nonfirm energy from July 1981 through October 1983. Pet. App. A9. The NF-1 and NF-2 rates applied to nonfirm customers in the Pacific Northwest region as well as to customers located outside that region. The rates were challenged by a group of Pacific Northwest customers, who contended that they were too low, and also by a group of California customers and regulators, who contended that the rates were too high.

4. Before FERC, BPA and other parties took the position that Section 7(k) requires FERC to base its review solely on the administrative record compiled by BPA. Pet. App. A21-A22 & n.9. FERC nevertheless instructed an administrative law judge to conduct an evidentiary hearing to supplement the record compiled by BPA. In November 1984, following a hearing, the ALJ issued an initial decision concluding that the NF-1 and NF-2 rates resulted in undercharges to California customers and disapproving the rates. *United States Dept. of Energy—Bonneville Power Admin.*, 29 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 63,039 (1984).

In September 1986, FERC issued an opinion rejecting the ALJ's conclusions and approving the rates as filed by BPA. Pet. App. C1-C41. FERC found that the NF-1 and NF-2 rates met the standards established by the statutes enumerated in Section 7(k) of the Regional Act.[4] Pet. App. C33-C36. As to the

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[4] As summarized by FERC, those statutes require BPA to design rates (1) "having regard to the recovery of the cost of generation and transmission of such electric energy"; (2) "so as to encourage the most widespread use of BPA power"; (3) "to provide the lowest possible rates to consumers consistent with sound business principles"; and (4) "in a manner which protects the interests of the United States in

contention of the Pacific Northwest customers that BPA's rates for sales to California were too low because they resulted in below-cost sales, FERC explained that "[i]f the market for energy does not ultimately turn out to be what BPA had expected at the time it was storing energy in its reservoirs, it may be necessary for BPA to lower its price below what it cost to produce the stored energy * * * rather than to have it be wasted through spill." Pet. App. C36. FERC also rejected arguments by the California parties that the rates for sales to California were too high. The California parties contended that BPA's nonfirm rate should have been derived from BPA's incremental cost (*i.e.*, the cost of producing an additional unit of energy) rather than from an unweighted proportionate share of BPA's full costs. FERC found that there was no feasible way for BPA to design the rates to reflect incremental cost. Because BPA's power is produced from a mix of hydroelectric and thermal sources, the incremental cost of production cannot be determined. Pet. App. C7-C8. FERC reaffirmed its conclusions in an opinion denying petitions for rehearing. Pet. App. D1-D9.

5. On appeal, the court of appeals concluded that FERC lacked authority to hold an evidentiary hearing to supplement the record, but affirmed FERC's decision on the merits. The court rejected FERC's contention that the agency is authorized under Section 7(k) of the Regional Act to conduct an evidentiary hearing if it determines that the record compiled by BPA is inadequate. The court concluded that FERC's position is inconsistent with other pro-

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amortizing its investments in the projects within a reasonable period." Pet. App. C2-C3.

visions of the Regional Act that require BPA to develop "a full and complete record" (16 U.S.C. 839e (i)(2)) and to come to a final decision based on that record (16 U.S.C. 839e(i)(5)); that require FERC to base its review and approval on the record compiled by BPA (16 U.S.C. 839e(k)); and that require the court of appeals to base its review on the record compiled by BPA (16 U.S.C. 839f(e)(2)). Pet. App. A19, A22-A23. The court noted that it was deciding "only that FERC may not hold an evidentiary hearing to supplement a record it thinks is inadequate." It expressly left open the possibility that "other circumstances" might permit FERC to hold an evidentiary hearing. *Id.* at A23.

The court of appeals then held that FERC's confirmation of the NF-1 and NF-2 rates was supported by substantial evidence in the record compiled before BPA. The court upheld FERC's finding that it is not feasible to determine the incremental cost of nonfirm energy produced by the Columbia River System. Pet. App. A24-A25. Accordingly, the court rejected the California parties' contention that the nonfirm rates should have been designed on an incremental basis rather than on an unweighted proportional basis. The court also rejected the Northwest parties' contention that the rates were too low since they did not fully recover BPA's costs. The court agreed with FERC that BPA's decision to cap the rates at cost, while allowing sales below cost in circumstances where the energy might otherwise be wasted, satisfied the statutory requirement that BPA encourage widespread use of BPA power at the lowest possible rates consistent with sound business principles. Pet. App. A30-A33. The court emphasized that the Regional Act does not require BPA to design rates in any particular way, and concluded that the NF-1 and

NF-2 rates met the standards of Section 7(k). Pet. App. A30-A33.

ARGUMENT

The court of appeals reasonably concluded that FERC lacks authority under Section 7(k) of the Regional Act to conduct an evidentiary hearing for the purpose of supplementing the record compiled before BPA. Because FERC has now acquiesced in the court of appeals' narrow resolution of this issue, further review is not warranted. In addition, the court of appeals' fact-bound decision affirming the NF-1 and NF-2 rates does not merit review by this Court.[5]

1. Petitioner contends (Pet. 9-13) that FERC is authorized under Section 7(k) of the Regional Act to hold an evidentiary hearing as part of its review of rates set by BPA. This contention does not warrant further review—especially in light of the fact that FERC ruled *against* petitioner on the basis of the record as supplemented by the evidentiary hearing FERC in fact held.

In any event, following the decision of the court of appeals in this case, FERC decided to acquiesce in the court's resolution of this issue. In a recent decision, FERC stated that

> In Aluminum Company of America v. Bonneville Power Administration, 903 F.2d 585, 591-

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[5] There is no basis for petitioner's suggestion (Pet. 8) that the NF-1 and NF-2 rates made BPA an uneconomic source of supply for California customers. On the contrary, the court of appeals noted that California utilities saved some $1.5 billion by purchasing power from BPA at the NF-1 and NF-2 rates. Pet. App. A30 n.14. BPA, on the other hand, realized only $270 million in NF-1 and NF-2 revenues. During the period that the rates were in effect, moreover, BPA's revenue shortfalls exceeded $680 million. *Ibid.*

> 94 (9th Cir. 1990), the Ninth Circuit held that the Commission may not hold an evidentiary hearing under section 7(k) to supplement a record we think is inadequate. The court did not completely foreclose the possibility that an evidentiary hearing could be held under other circumstances. *Id.* at 594. However, since the Commission agrees with the Ninth Circuit's decision, we do not anticipate evidentiary hearings in future section 7(k) proceedings.

United States Department of Energy—Bonneville Power Administration, Docket No. 87-2011-005 (Nov. 14, 1990) slip op. 10 n.28.[6] Thus, FERC and BPA now agree with the regional court of appeals—which has exclusive jurisdiction to review questions arising under Section 7(k), 16 U.S.C. 839f(e)(5)—that FERC is not authorized to hold an evidentiary hearing for the purpose of supplementing the record under Section 7(k). Because the issue is unlikely to arise in future cases, it does not merit the attention of this Court.

Petitioner contends that the court of appeals failed to accord sufficient deference to FERC's (former) interpretation of Section 7(k). But BPA—the agency that drafted the Regional Act—consistently has taken the position that FERC is not authorized to conduct an evidentiary hearing to supplement BPA's record. This Court has recognized that "the [BPA] Administrator's interpretation of the Regional Act is to be given great weight." *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, 467 U.S. 380, 389 (1984). It is true that FERC's recent decision to adopt BPA's view, to the extent that it conflicts with its earlier interpretation,

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[6] FERC's decision is reprinted as an appendix to this brief. (See App., *infra*, 13a-14a).

may be entitled to less deference than a consistently held agency view. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446-447 n.30 (1987) (quoting *Watt* v. *Alaska*, 451 U.S. 259, 273 (1981)). But FERC's change of position is not as dramatic as it might appear to be. Before this case reached the court of appeals, FERC recognized that "[t]here may be merit to BPA's argument that * * * an additional hearing need not be an evidentiary hearing and that the mandate of [Section 7(k)] may be fulfilled, instead, by providing the parties with the opportunity to file briefs or written comments." 23 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,469, at 62,024.

The court of appeals' resolution of this issue is both reasonable and narrowly limited to the situation presented in this case. It is true that the last sentence of Section 7(k) affords the parties an opportunity for "an additional hearing in accordance with the procedures established for ratemaking by the Commission pursuant to the Federal Power Act." But as the court of appeals observed (Pet. App. A19), Section 7(k) also requires FERC to review BPA's rates "based upon the record of proceedings established under subsection (i) [codified at 16 U.S.C. 839e(i)] of this section." And the court of appeals is required to determine whether FERC's decisions are "supported by substantial evidence in the rulemaking record required by section 839e(i) of this title considered as a whole." 16 U.S.C. 839f(e)(2). The record required by Section 839e(i) is the record compiled at an evidentiary hearing before BPA.[7]

[7] Petitioner contends (Pet. 10) that review "[b]ased on" the record does not mean review "limited to" the record. But it is difficult to see how a decision that relies on facts not in the BPA record could be "based on" that record.

Moreover, as this Court noted in construing analogous provisions of Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, FERC views its role in reviewing hydroelectric rates established by federally-owned projects as " 'in the nature of an appellate body.' * * * In exercising that appellate function, FERC relies on the record before it, remanding for supplementation if necessary." *United States* v. *City of Fulton*, 475 U.S. 657, 663 (1986) (quoting 45 Fed. Reg. 79,545, 79,547 (1980)).[8] In view of the other provisions of the statute and the appellate nature of FERC's review, the court of appeals reasonably concluded that the additional hearing before FERC afforded by Section 7(k) may not be an evidentiary hearing for the purpose of supplementing the record.

Finally, this is the first case to come before FERC (and, consequently, the court of appeals) under Section 7(k). See Pet. App. C2. Moreover, the Ninth Circuit's decision is narrowly confined to the circumstances of the case. In deciding that FERC "may not hold an evidentiary hearing to supplement a record it thinks is inadequate," the court expressly left open the possibility that an evidentiary hearing could be held "under other circumstances." Pet. App. A23. Because the hearing question may arise in a variety of factual and procedural contexts in future cases, further review in this case would be premature.[9]

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[8] Because FERC may conduct a non-evidentiary hearing, and may also remand to BPA to supplement the record if necessary, there is no basis for petitioner's assertion (Pet. 12-13) that California customers will be denied the opportunity for an impartial hearing.

[9] Respondent California Energy Commission (CEC) contends that the court of appeals, having determined that

2. Contrary to petitioner's contentions (Pet. 13-18), the court of appeals correctly held that FERC's confirmation of the NF-1 and NF-2 rates is supported by substantial evidence in the record. None of the fact-specific issues raised by petitioner warrants review by this Court.[10]

Petitioner renews its argument (Pet. 14-15) that BPA may not charge its nonfirm customers more

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FERC lacked authority to conduct an evidentiary hearing, was required to remand the case to FERC rather than affirming its decision. CEC Br. 9 (citing *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)). Because this contention is not presented in the petition for certiorari, or fairly included in the questions presented, it should not be considered by this Court. See Supreme Court Rule 14.1(a). We note that respondent CEC has not filed a cross-petition for a writ of certiorari. See Supreme Court Rule 12.3. In any event, *Chenery* held that a court may not affirm the decision of an administrative agency on a ground not asserted by the agency. Here, the court of appeals did not affirm on a ground not asserted by FERC, but rather affirmed FERC's findings and conclusions on the basis of substantial evidence in the BPA record. See 16 U.S.C. 839f(e)(2). Even if the *Chenery* doctrine were applicable here, it would require a remand only if there were a significant possibility that, but for the error, the agency would in fact have reached a different result. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion). If FERC had determined at the outset that it could not hold an evidentiary hearing, it presumably would have directed BPA to receive additional evidence. There is no reason to think that additional evidence presented to BPA would have differed from the evidence presented to FERC, or that FERC would have reached a different decision on the merits.

[10] Respondent CEC focuses much of its attention on BPA's policy for allocating excess transmission capacity—a policy that it concedes is "not before this Court." CEC. Br. 4.

than the incremental cost of the energy they consume, and consequently is prohibited from designing rates that reflect nonfirm customers' unweighted proportional share of BPA's full costs. Petitioner disparages, as "fallac[ious]," (Pet. 14) the findings of FERC, unheld by the court of appeals, that BPA operates its system to maximize the production of useful energy and that BPA cannot feasibly determine the incremental cost of its output. But petitioner offers no persuasive reason for this Court to reexamine those fact-bound determinations. Contrary to petitioner's suggestion, the fact that BPA decides whether to invest in *additional* generating capacity on the basis of anticipated demand in the Pacific Northwest region does not imply that BPA operates *existing* facilities solely for the benefit of customers in that region. And while petitioner asserts the BPA is no less able to determine its incremental costs than other utilities, it does not dispute FERC's findings that the Columbia River System is unique because of its heavy reliance on hydropower and its substantial storage capacity. Pet. App. C6.

Contrary to petitioner's assertion (Pet. 15), it is not "beside the point" that FERC found that BPA's California customers benefit from BPA's entire system. The fact that California customers benefit from BPA's entire system affords a basis for allocating a proportional share of the system's full costs to those customers. Pet. App. A25. Moreover, there is no basis for petitioner's assertion (Pet. 16-17) that FERC "ignored its responsibilities" by failing to determine whether BPA's rates encouraged the most widespread use of nonfirm energy at the lowest possible price. FERC expressly found that BPA's rates

encouraged "widespread use" and the lowest possible rates consistent with sound business principles. Pet. App. C35-C36, D6-D7. The court of appeals concluded that the rates were consistent with the "widespread use" standard. Pet App. A33. Petitioner errs in suggesting (Pet. 17-18) that the rates approved by FERC were inconsistent with sound business principles. The nonfirm energy revenues collected under the rates at issue here contributed to BPA's overall cost recovery. All BPA revenues are statutorily required to be used to pay BPA's costs and scheduled amortization. See 16 U.S.C. 839e (a)(1). It is thus incorrect for petitioner to suggest (Pet. 17) that revenues from nonfirm service serve only to reduce rates for firm service. FERC's administrative law judge correctly rejected this argument, recognizing that "the nonfirm customers should pay those costs which in essence have been allocated to them." 29 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 63,039, at 65,083.

Finally, there is no merit to petitioner's contention that BPA's costs associated with the Washington Public Power Supply System (WPPSS) nuclear plants should not have been charged to BPA's nonfirm customers. See Pet. 18. According to petitioner, the costs associated with these plants should not have been included in BPA's rates because the WPPSS plants did not produce energy during the period at issue here. But as the court of appeals observed (Pet. App. A28), if BPA were required to pay its WPPSS obligations but prevented from charging ratepayers for them until the WPPSS plants produced energy, funds to repay federal investment in the Columbia River System would have to be diverted, contrary to the purposes of Section 7(k). Thus, inclusion of WPPSS costs was permissible to meet BPA's con-

tractual obligations to pay for purchased power on a current basis and to amortize federal investment within a reasonable time. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EF87-2011-005

Before Commissioners: Martin L. Allday, Chairman;
Charles A. Trabandt,
Elizabeth Anne Moler,
Jerry J. Langdon
and Branko Terzic.

UNITED STATES DEPARTMENT)
OF ENERGY—BONNEVILLE)
POWER ADMINISTRATION)

ORDER GRANTING REHEARING

(Issued November 14, 1990)

On May 16, 1988, the Bonneville Power Administration (Bonneville), the Northwest Parties,[1] the California Utilities,[2] and the M-S-R Public Power

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[1] The "Northwest Parties" refers to the Public Power Council, the Association of Public Agency Customers, the Public Generating Pool, the Pacific Northwest Generating Company, and the Direct Service Industries.

[2] The "California Utilities" refers to Southern California Edison Company, the Department of Water and Power of the City of Los Angeles, the Public Service Department of the City of Glendale, the Public Service Department of the City

Agency (M-S-R)[3] filed separate requests for rehearing[4] of the Commission's April 6, 1988 order[5] issued in Docket No. EF87-2011-003.[6]

Background

The April 6, 1988 order rejected Bonneville's SL-87 rate schedule, the rate schedule for long-term surplus firm power, as insufficiently specific within the meaning of section 300.1 of the Commission's regulations.[7] The Commission also ruled that all of Bonne-

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of Burbank, and the Water and Power Department of the City of Pasadena.

[3] "M-S-R" consists of the Modesto Irrigation District, the City of Santa Clara, and the City of Redding. M-S-R was formed to acquire, construct, maintain, and operate generation and transmission facilities for the benefit of its members.

[4] Bonneville, the Northwest Parties and M-S-R raise similar issues and will be referred to as the petitioners.

[5] On April 25 and April 28, 1988, Bonneville and the Northwest Parties filed motions for an extension of time to file requests for rehearing. On May 3, 1988, the Commission granted a waiver of the Commission's regulations to allow an extension of time to file requests for rehearing until May 16, 1988.

[6] United States Department of Energy—Bonneville Power Administration, 43 FERC ¶ 61,032 (1988).

[7] 43 FERC at 61,086; *see also* 18 C.F.R. § 300.1 (1990). On April 14, 1988, Bonneville filed a request for a stay of further Commission action on all pending Bonneville rate filings until the Commission acted on the pending rehearing request or until August 8, 1988, the end of the 120-day period provided for the filing of a substitute for the rejected SL-87 rate schedule. On April 27, 1988, the Northwest Parties filed a motion in support of Bonneville's motion for stay. On April 28, 1988, the California Utilities filed an answer in opposition to Bonne-

ville's rates covering sales outside the Pacific Northwest region,[8] whether classified by Bonneville as either "firm" or "nonfirm" sales,[9] must meet the standards of review of section 7(k) of the Pacific Northwest Power Planning and Conservation Act (Northwest Power Act).[10]

In addition, the April 6, 1988 order addressed future rate filings for non-regional sales which provide

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ville's motion requesting a stay. The Commission took no action on the request for a stay.

On August 3, 1988, Bonneville requested an extension of four days to file its substitute rates for the rejected SL-87 rate schedule. The extension was granted. On August 12, 1988, as completed on October 14, 1988, Bonneville filed its substitute for the SL-87 rate schedule (Modified SL-87) in Docket No. EF87-2011-007. The Commission granted interim approval to the Modified SL-87 rate schedule on December 1, 1988. United States Department of Energy—Bonneville Power Administration, 45 FERC ¶ 61,358 (1988).

[8] The Pacific Northwest region means:

> "(A) the area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River drainage basin; and
>
> (B) any contiguous areas, not in excess of seventy-five air miles from the area referred to in subparagraph (A), which are a part of the service area of a rural electric cooperative customer served by the Administrator on the effective date of this Act which has a distribution system from which it serves both within and without such region."

16 U.S.C. § 839a(14) (1988).

[9] *Cf.* Southern California Edison Company v. Jura, 909 F.2d 339, 341 n.1 (9th Cir. 1990) (discussion of what Bonneville classifies as "firm" and "nonfirm" power).

[10] 43 FERC at 61,086-88; *see also* 16 U.S.C. § 839e(k) (1988).

Bonneville with a significant degree of flexibility in pricing. The Commission stated, *inter alia*, that Bonneville must demonstrate, in any such future rate filings, that the pricing flexibility sought would not result, due to Bonneville's market power, in prices inconsistent with the encouragement of the most widespread use of Bonneville's power at the lowest possible rate consistent with sound business principles.[11]

On May 16, 1988, Bonneville filed a request for rehearing. Bonneville alleges that the Commission erred in concluding that section 7(k) of the Northwest Power Act applies to all Bonneville sales outside the Pacific Northwest region. Bonneville also states that the Commission erred by precluding Bonneville from making firm sales outside the Pacific Northwest region. In addition, Bonneville claims that the April 6, 1988 order attempts to review Bonneville's transmission policies, which exceeds the scope of the Commission's regulatory authority. Bonneville also alleges that the Commission erroneously asserted jurisdiction over Bonneville's extraregional marketing in violation of the Commission's regulatory authority. Finally, Bonneville asserts that if the Commission plans to examine the cost basis for the surplus firm power rate in the ordered evidentiary hearing, Bonneville is entitled to recover its firm power cost to repay the Federal treasury.

On May 16, 1988, the Northwest Parties filed a request for rehearing. The Northwest Parties support the Commission's rejection of the SL-87 rate schedule. However, they disagree with those portions of the April 6, 1988 order which require all nonregional power sales to be reviewed under section

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[11] 43 FERC at 61,088.

7(k). The Northwest Parties argue that the definition of firm power in the April 6, 1988 order conflicts with the definitions used by the courts. In addition, the Northwest Parties assert that the Commission's reversal of prior, long-standing law and policy without notice and opportunity to comment violates due process, and that the Commission appears to have failed to consider the extensive implications of the reversal on sales contracts other than Bonneville's. The Northwest Parties also assert that "market power" is an inappropriate standard for Bonneville. The Northwest Parties state that there was no evidence presented to demonstrate that Bonneville has exercised market power, and they claim that the burden of proof that such power exists is properly on a party claiming injury from the exercise of market power.

On May 16, 1988, the California Utilities filed a request for rehearing seeking clarification of the effect of the April 6, 1988 order on Bonneville's 1985 rates. The California Utilities request that the Commission clarify that portion of the April 6, 1988 order which addressed the SP-85 rate schedule pending in Docket No. EF85-2011-000. The California Utilities ask the Commission to rule that sales made under Bonneville's SP-85 rate schedule, the short-term surplus firm power rate schedule, must be sold under the NF-85 rate schedule, Bonneville's nonfirm energy rate schedule. The California Utilities do not, however, disagree with the Commission's decision that all non-regional rates must be reviewed under section 7(k).

On May 16, 1988, M-S-R filed a motion to intervene out of time in this proceeding arguing that M-S-R was unaware before the April 6, 1988 order that the Commission would rule that all of Bonneville's non-

regional sales are "nonfirm" sales. On May 16, 1988, M-S-R also filed a request for rehearing of the April 6, 1988 order. M-S-R argues that the order departs from precedent, is erroneous, could substantially and adversely affect the power markets within the Pacific Northwest region and in California, and could adversely affect potential purchasers from Bonneville.

On May 31, 1988, the Public Utility Commission of Oregon (Oregon Commission) filed an untimely motion to intervene. The Oregon Commission expresses concern about the Commission's reading of sections 7(a)(2) and 7(k) of the Northwest Power Act.

On June 9, 1988, the Washington Water Power Company (Washington Water Power) filed an untimely motion to intervene, raising no issues.

On March 2, 1990, Bonneville filed a motion to lodge the Ninth Circuit Court of Appeals' opinion, *Aluminium Company of America v. Bonneville Power Administration*, 891 F.2d 748 (9th Cir. 1989), which affirmed the Commission's final approval and confirmation of Bonneville's 1981 and 1982 nonfirm energy rates. Bonneville also moved to vacate the Commission's April 6, 1988 order. Bonneville further moved to supplement its answer in opposition to the comments of the intervenors.[12]

On March 13, 1990, the California Utilities filed motions to dismiss Bonneville's motion to lodge, motion to vacate, and motion to supplement or, in the alternative, to extend the time to answer Bonneville's motions.

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[12] On April 27, 1988, prior to its filing of the instant rehearing, Bonneville filed an answer in opposition to the California Utilities' motion to lodge an order and supplement its briefs.

On March 19, 1990, Puget Sound Power & Light Company (Puget) filed an answer to Bonneville's March 2, 1990 motions stating that it does not object to Bonneville's motions.

On March 23, 1990, Washington Water Power filed a renewal of its motion to intervene, stating that it joins Puget's response to Bonneville's March 2, 1990 motion.

On April 9, 1990, the California Utilities again filed in opposition to Bonneville's March 2, 1990 motion, contending that Bonneville's motion is premature and irrelevant to the April 6, 1988 order.

On May 30, 1990, Bonneville filed a motion to lodge the amended Ninth Circuit opinion in *Aluminum Company of America v. Bonneville Power Administration*, 903 F.2d 585 (9th Cir. 1990),[13] as a supplement to Bonneville's previously filed motion to lodge.

Discussion

We find that good cause exists to grant the untimely and unopposed motions to intervene of M-S-R, Washington Water Power and the Oregon Commission, given the interest of the constituencies which they represent and the absence of any undue prejudice or delay.[14]

In their requests for rehearing, the petitioners allege several errors in the April 6, 1988 order. First, the petitioners contend that section 7(k) of the Northwest Power Act does not grant the Commission juris-

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[13] *Reh'g denied*, 909 F.2d 339 (9th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3278 (U.S. September 19, 1990) (No. 90-505).

[14] *See* 18 C.F.R. § 385.214(a)(2) (1990).

diction to review Bonneville's extraregional surplus firm power rates and that Bonneville is authorized to sell surplus firm power outside the region. Second, the petitioners state that Bonneville's statutory mandate to market surplus power is separate and distinct from statutory provisions under which Bonneville develops rates subject to Commission review. Therefore the petitioners argue that the Commission has no authority over Bonneville marketing activities. Third, Bonneville asserts that the Commission's conclusion that all extraregional power sales are nonfirm infringes upon Bonneville's marketing authority, is inconsistent with industry practice, and contradicts Bonneville's organic statutes.

Bonneville also states that it must still recover its firm power cost even if the Commission adheres to its conclusion that Bonneville firm power sales outside the Pacific Northwest are nonfirm.

Extraregional Sales of Firm Power

The petitioners claim, *inter alia*, that the Commission failed to recognize rulings by the Ninth Circuit Court of Appeals in arriving at its decision in its April 6, 1988 order disapproving Bonneville's SL-87 rate schedule. In light of the arguments made on rehearing and our review of recent Ninth Circuit precedent, the Commission has reexamined its ruling that any sale of power outside the Pacific Northwest region must be reviewed as a sale of nonfirm power under section 7(k). Upon further consideration, we find that this interpretation is incorrect, and, accordingly, we will grant rehearing.

Section 7(k) of the Northwest Power Act provides in pertinent part:

> [A]ll rates or rate schedules for the sale of nonfirm electric power within the United States, but outside the region, shall be established . . . by the Administrator in accordance with the procedures of subsection (i) of this section . . . and in accordance with the Bonneville Project Act, the Flood Control Act of 1944, and the Federal Columbia River Transmission System Act . . . . [S]uch rates or rate schedules shall become effective after review by the Federal Energy Regulatory Commission for conformance with the requirements of such Acts . . . .[15]

The Ninth Circuit in *Aluminum Company of America v. Bonneville Power Administration*, 903 F.2d 585 (9th Cir. 1990), pointed out that in interpreting section 7(k) the Commission should not render meaningless any of the provisions of section 7(k); no clause, sentence or word should be rendered superfluous, void, contradictory, or insignificant.[16] The Commission's interpretation of section 7(k) in the April 6, 1988 order failed to give weight to the word "nonfirm" in the statute. To treat all sales outside the Pacific Northwest region as sales of nonfirm power renders meaningless the statute's attention to both nonfirm and firm power, and section 7(k)'s express attention to only nonfirm power.

In *Central Lincoln Peoples' Utility District v. Johnson*, 735 F.2d 1101 (9th Cir. 1984), the Ninth Circuit found that, in fact, the majority of power

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[15] 16 U.S.C. § 839e(k) (1988).

[16] 903 F.2d at 594 (quoting Ruiz v. Morton, 462 F.2d 818, 820 (9th Cir. 1972), which, in turn, quotes Rockbridge v. Lincoln, 449 F.2d 567, 571 (9th Cir. 1971), *aff'd*, 415 U.S. 199 (1974)).

sold outside the Pacific Northwest region is nonfirm.[17] However, under section 9(c) of the Northwest Power Act,[18] only "surplus energy" and "surplus peaking" capacity may be sold outside the Pacific Northwest.[19] The question thus is whether surplus energy or surplus peaking capacity can ever be considered firm power.

The Northwest Power Act answers that question in the affirmative; surplus power can be firm power. The Northwest Power Act recognizes the difference between surplus firm and surplus nonfirm power in section 5(f). Section 5(f) provides, in pertinent part:

> The Administrator is authorized to sell, or otherwise dispose of, electric power, including power acquired pursuant to this and other Acts, that is surplus to his obligations incurred pursuant to subsections (b), (c), and (d) of this section in accordance with this and other Acts applicable to the Administrator . . . .[20]

Subsections (b), (c) and (d) provide for sales to Pacific Northwest regional customers. These customers are Pacific Northwest public, investor-owned utility and industrial customers.[21] What power re-

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[17] 735 F.2d at 1112.

[18] 16 U.S.C. § 839f(c) (1988).

[19] 735 F.2d at 1112.

[20] 16 U.S.C. § 839c(f) (1988).

[21] Sections 5(b), (c), and (d) provide in pertinent part:

(b) (1) Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative entitled to preference and priority under the Bonneville Project Act of 1937 and to each requesting investor-

mains once these customers' needs are met may be sold pursuant to section 5(f). That provision does not limit the Administrator's sales of surplus power to only nonfirm power once the Pacific Northwest regional customers' needs are met, but instead allows sales of surplus power without limitation to nonfirm power. Accordingly, we find that the Northwest Power Act recognizes surplus power can be firm, and separate and apart from nonfirm. We thus conclude that the Commission's earlier order erroneously equated surplus power and nonfirm power.[22] The two are not necessarily the same.

Furthermore, section 7(k) by its terms speaks only of *nonfirm* power sales outside the Pacific Northwest.[23] If all power sales outside the Pacific Northwest, as distinct from only nonfirm power sales, were to be subject to section 7(k), the reference to nonfirm power sales would be superfluous. That section 7(k) speaks only of nonfirm power sales means that those

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owned utility electric power to meet the firm power load of such public body, cooperative or investor-owned utility in the Region . . . .

(c)(1) Whenever a Pacific Northwest electric utility offers to sell electric power to the Administrator at the average system cost of that utility's resources in each year, the Administrator shall acquire by purchase such power and shall offer, in exchange, to sell an equivalent amount of electric power to such utility for resale to that utility's residential users within the region.

(d)(1)(A) The Administrator is authorized to sell in accordance with this subsection electric power to existing direct service industrial customers. Such sales shall provide a portion of the Administrator's reserves for firm power loads within the region.

[22] *See* 43 FERC at 61,087.

[23] 16 U.S.C. § 839e(k) (1988).

power sales outside the Pacific Northwest that are not nonfirm power sales are not subject to section 7(k)—*i.e.*, that firm power sales can be made outside the Pacific Northwest and that such sales are not subject to section 7(k).

Moreover, under the Northwest Power Act, power resources are considered surplus when there is no market or demand for them at an established rate within the Pacific Northwest.[24] That is, surplus power is power in excess of what customers within the Pacific Northwest region are willing to buy at the rate Bonneville offers the power. In contrast, under the Northwest Power Act, nonfirm energy is energy in excess of that which Bonneville can reliably plan on producing, based on estimates that water levels used for power generation will at times be low or critical.[25]

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[24] 16 U.S.C. § 839f(e) (1988); *see also* 903 F.2d at 588-89; *accord*, 909 F.2d at 340; 735 F.2d at 1112; California Energy Commission v. Bonneville Power Administration, 909 F.2d 1298, 1303 (9th Cir. 1990).

[25] 909 F.2d at 341 n.1 (" 'Nonfirm' is an accounting term. Devising a worst case scenario from historical data on streamflows, [Bonneville] calculates the minimum amount of energy it is likely to produce during a given period in the future, and designates this amount as its 'firm power' for that period; it refers to all energy in excess of that amount as 'nonfirm power.' "); Central Lincoln Peoples' Utility District v. Johnson, 686 F.2d 708, 710 (9th Cir. 1982), *rev'd on other grounds sub nom.* Aluminum Company of America v. Central Lincoln Peoples' Utility District, 464 U.S. 380 (1984); *see also* 903 F.2d at 588-89. Moreover, the Ninth Circuit granted Bonneville's May 14, 1990 motion to amend the opinion and accordingly issued its amended opinion, Aluminum Company of America v. Bonneville Power Administration, 903 F.2d 585 (9th Cir. 1990). As a result, the court changed language that arguably could have been interpreted to equate surplus

That is, nonfirm energy is energy that is available to Bonneville as the result of its having water available for power generation in excess of its historic lowest level used to establish its firm power capability. Surplus power and nonfirm power are therefore simply not the same. Firm surplus power means, then, firm power that exceeds the regional need for such power and therefore is surplus even though it may be energy in excess of minimum production, *i.e.*, at minimum water levels.

In addition, the Northwest Power Act addresses the sale of power, including firm power, by Bonneville without imposing any limits on customers to which Bonneville can market that power.[26] In this regard, we note that Bonneville has a contract with Southern California Edison Company for the sale of surplus firm power,[27] and that the contract expressly provides for the sale of surplus firm power pursuant to the SP-85 rate schedule.

Based on the above, we conclude that both firm and nonfirm power may be sold outside the Pacific Northwest region and that section 7(k) applies only to nonfirm sales.[28]

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energy to nonfirm energy. *Compare* 903 F.2d at 587, 588, 595 *with* 891 F.2d at 750, 751, 757.

In this regard, we note that "Bonneville integrates hydroelectric energy production with other energy-producing resources. Bonneville describes the reservoir as an inventory of energy, in which the quantity of water depends not only on streamflows, but on the use of thermal resources, power purchases, and conservation." 903 F.2d at 588.

[26] 16 U.S.C. § 839f(d) (1988).

[27] U.S. Department of Energy—Bonneville Power Administration, 36 FERC ¶ 61,350 (1986).

[28] In Aluminum Company of America v. Bonneville Power Administration, 903 F.2d 585, 591-94 (9th Cir. 1990), the

Bonneville's Marketing Activities

The Commission held in its April 6, 1988 order that Bonneville could only sell nonfirm power outside the region. Accordingly, the petitioners assert that the Commission sought to control how Bonneville markets its power, because under the Commission's April 6, 1988 order Bonneville could not sell firm power to customers outside the Pacific Northwest region. The petitioners argue that the Commission has no authority over Bonneville's marketing activities. Bonneville adds that its power marketing authority is exclusive and Bonneville's determination of the products it markets and the manner in which it markets them is a given for purposes of the Commission's rate review.

As discussed above, we are reversing our earlier finding that Bonneville can only sell nonfirm power outside the region. This reversal effectively moots the petitioners' assertion that the Commission somehow sought to control Bonneville's marketing practices. Moreover, Bonneville's authority to market power is an exclusive grant of authority from Congress under four statutes: the Bonneville Project Act, 16 U.S.C. §§ 832-832*l*, the Regional Project Act, 16 U.S.C. §§ 837-837h, the Federal Columbia River Transmission System Act, 16 U.S.C. §§ 838-838k, and the Northwest Power Act, 16 U.S.C. §§ 839-839h. After

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Ninth Circuit held that the Commission may not hold an evidentiary hearing under section 7(k) to supplement a record we think is inadequate. The court did not completely foreclose the possibility that an evidentiary hearing could be held under other circumstances. *Id.* at 594. However, since the Commission agrees with the Ninth Circuit's decision, we do not anticipate evidentiary hearings in future section 7(k) proceedings.

a power product has been identified, Bonneville establishes a rate for the sale of the product. Only then does the Commission exercise its authority to confirm and approve, or disapprove, that rate. As Bonneville states, its authorization to market surplus power is separate from its authority to set rates. The Commission's role is limited to the latter, to the review of rates established by Bonneville.

Recovery of Firm Power Costs

The April 6, 1988 order does not address Bonneville's recovery of its firm power costs to repay the Federal treasury. Bonneville, however, argues that if the Commission plans to examine the cost basis for surplus firm power in the ordered evidentiary hearing, Bonneville is entitled to recover its firm power cost to repay the Federal treasury. Section 7(g) of the Northwest Power Act provides that Bonneville shall equitably allocate to power rates, in accordance with generally accepted ratemaking principles, all costs and benefits not otherwise allocated.[29] That is, section 7(g) provides for the recovery of costs associated with the sale of surplus or excess power. As discussed earlier, we now find that surplus power can be considered firm power. Accordingly, we find that Bonneville is entitled to recover its firm power costs through the firm power rates at issue here.[30]

Other Issues

Bonneville claims that the April 6, 1988 order attempts to review Bonneville's transmission policies,

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[29] 16 U.S.C. § 839e(g) (1988).

[30] *Cf.* 909 F.2d at 342-43 & n.5.

and that the order therefore exceeds the scope of the Commission's regulatory authority. Since we have granted rehearing, and have found that section 7(a) of the Northwest Power Act is applicable in the instant proceeding, as opposed to section 7(k), this issue is now moot.

The California Utilities request rehearing for the purpose of clarifying the effect of the April 6, 1988 order on Bonneville's SP-85 rate schedule at issue in Docket No. EF85-2011.[31] The California Utilities ask the Commission to rule that sales made under Bonneville's SP-85 rate schedule (short-term surplus firm power) must be sold under Bonneville's NF-85 rate schedule (nonfirm energy rate). We will address Bonneville's SP-85 rate schedule in a subsequent order in Docket No. EF85-2011.

The Commission orders:

(A) The M-S-R's, the Oregon Commission's and the Washington Water Power's untimely motions to intervene are hereby granted, subject to the Commission's Rules of Practice and Procedure.

(B) The petitioner's requests for rehearing are hereby granted, as discussed in the body of this order.

(C) The California Utilities' request for clarification is hereby deferred, and, as discussed in the body of this order, will be addressed in Docket No. EF85-2011.

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[31] In the April 6, 1988 order, the Commission, based upon its finding that all nonregional sales were nonfirm (a finding we reverse herein), stated that the presiding judge in Docket No. EF85-2011 need not address whether the SP-85 rate schedule was effectively interruptible so that it should be considered nonfirm. 43 FERC at 61,088-89 n.20.

By the Commission.

[SEAL]

/s/ Lois D. Cashell
Lois D. Cashell
Secretary

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